

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WYNN LAS VEGAS, LLC

and

Case 28-CA-23070

DAVID A. SACKIN, an Individual

Mara-Louise Anzalone, Esq., of Phoenix, Arizona
On Behalf of the General Counsel

Gregory J. Kamer, Esq., Bryan J. Cohen, Esq.
(Kamer Zucker Abbott) of Las Vegas, Nevada
On Behalf of Respondent

David Sackin, Pro Se

DECISION

Statement of the Case

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Las Vegas, Nevada on March 8, 2011, upon the Complaint issued on August 31, 2010, by the Regional Director for Region 28.

The Complaint alleges that Wynn Las Vegas, LLC (Respondent) violated Section 8(a)(1) and (3) of the Act by laying off Charging Party David Sackin (Sackin) on June 15, 2010 because he engaged in protected concerted and union activity. In its Answer Respondent admitted many of the operative allegations of the Complaint but denied it had violated the Act.

Findings of Fact

Upon the entire record herein¹, including the briefs from the General Counsel,² and Respondent, I make the following findings of fact.

¹ On September 30, 2009, Counsel for the General Counsel filed a Motion to Correct the Record. Good cause having been shown and no opposition filed, the Motion is granted.

² On October 14, 2009, Counsel for the General Counsel filed an Errata to Post Hearing Brief. As the Errata corrected a clerical error and there is no opposition, I accept the Errata.

I. Jurisdiction

Respondent admitted it is a Nevada domestic limited liability company with an office and place of business located in Las Vegas, Nevada, where it is engaged in the operation of a casino, hotel and restaurants. Annually, Respondent in the course of its business operations derived gross revenues in excess of \$500,000 and purchased and received at its facility goods valued in excess of \$50,000 in directly from points outside the State of Nevada.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

Respondent admitted and I find that the Transport Workers Union of America, Local 721, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts

1. Background

This case originated in a prior unfair labor practice case heard and decided by ALJ James M. Kennedy. Judge Kennedy issued his decision³ in Wynn Las Vegas, LLC, case 28-CA-22818, on December 14, 2010. Judge Kennedy heard this case between May 11 and June 7, 2010, and found, inter alia, that Respondent Wynn Las Vegas, LLC, violated section 8(a)(1) and (3) of the Act on August 28, 2009 by issuing a warning to and suspending David Sackin because he was a union steward and engaged in protected concerted activity. Respondent has filed exceptions with the Board contesting Judge Kennedy's findings of fact and conclusions of law in case 28-CA-22818, finding that the discipline issued to on August 28, 2009 Sackin violated section 8(a)(1) and (3) of the Act.

The parties herein entered into Joint Stipulations of the Parties⁴ where they agreed that Sackin was chosen for lay off on June 15, 2010, solely because of his August 28, 2009 discipline found to be unlawfully discriminatory by Judge Kennedy. The parties also stipulated that Respondent recalled Sackin to work on November 30, 2010.

The sole issue to be decided here is whether Respondent should have the opportunity to re-iterate the validity of Sackin's underlying August 28, 2009 discipline or whether the doctrine of collateral estoppel precludes such litigation.

Counsel for the Acting General Counsel argues that the issue of Sackin's discipline was resolved in the trial before Judge Kennedy and relitigation of the issue is barred by the doctrine of collateral estoppel.

³ JD(SF)-52-10

⁴ Joint exhibit 1.

Respondent contends that it should have been allowed the opportunity herein to present evidence that Sackin would have received some lesser form of discipline on or about August 28, 2009, albeit less severe than the discipline he in fact received.⁵ Respondent argues that Judge Kennedy found that some level of discipline for Sackin was appropriate, that only the level of discipline in fact issued was inappropriate and that Judge Kennedy left the issue of the severity of Sackin's discipline open when he found in his decision at page 15, lines 36-37, "In that sense, some admonishment or counseling was appropriate, perhaps at the cost of the attendance points he should have incurred." Respondent argues further than under *Miller Brewing Co.*, 254 NLRB 266, 267 (1981), I should have considered whether a lesser form of punishment for Sackin was appropriate.

The Analysis

Judge Kennedy's Findings

In his decision at page 15, lines 29-32, Judge Kennedy found that Respondent's August 28, 2009 discipline of Sackin was motivated by its hostility towards his union and other protected concerted activity:

I find that the degree of punishment in this case was not supported by the underlying facts and instead the discharge was due to its (Respondent's) animus against protected conduct-his union stewardship and his willingness to testify in the labor commission hearing.

At page 16, lines 8-14 of Judge Kennedy's decision he lists the factors he considered in concluding Respondent harbored animus toward Sackin when it disciplined him on August 28:

Both its departure from its policy of progressive discipline and its abrupt, high level of punishment, the second, last and final warning resounds as a warning shot. Respondent's over weighted conclusion that Sackin violated eleven policies in running a few minutes late: its statement that it could have terminated him but would instead give to him the lesser punishment of time served suspension; at the same time warning him to remain under the radar; and telling him that he had been allowed to return to work "by the hair of (his) chin," all taken together are evidence of an anti-steward motive.

Judge Kennedy concluded at page 16, lines 19-22:

Based on the totality of the surrounding circumstances, it is evident that Respondent disciplined Sackin to such an extreme degree because of its animus arising from his two instances of protected conduct, his stewardship and his willingness to testify on behalf of his fellow employees at the Labor Commission hearing.

As to Respondent's defense, at page 16, lines 25-27 Judge Kennedy concluded that Respondent:

⁵ On March 8, 2011, Counsel for the Acting General Counsel filed a Motion in Limine to preclude Respondent from offering any evidence at this hearing regarding whether it would have issued Sackin a lesser level of discipline justifying his layoff. At the hearing, after hearing argument from the parties, I granted Counsel for the Acting General Counsel's motion.

... has not persuaded me that it would have taken the same action if Sackin had not been a steward or if he had not been supportive of the employee cause before the Labor Commissioner.

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Judge Kennedy's comments on the degree of discipline that Respondent imposed relate only to Respondent's motive in issuing discipline. Respondent's contention that Judge Kennedy left open whether a lesser degree of discipline may have been appropriate is not supported by the record. Further, Judge Kennedy's gratuitous remarks that, "some admonishment or counseling was appropriate", are *dicta* as they were not essential to Judge Kennedy's finding of Respondent's anti union animus. Judge Kennedy's central conclusion is that Respondent's discipline meted out to Sackin was unlawful. A lesser form of discipline was not meted out. Respondent's argument that some lesser form of discipline would have been justified, is mere speculation.

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Respondent's citation to *Miller Brewing Co.*, 254 NLRB 266, 267 (1981) for the proposition that I should have considered a lesser form of punishment for Sackin is inapposite to the facts of this case. The ALJ in *Miller Brewing* found that more severe discipline issued to union stewards than to rank and file employees violated the Act. There was no need to relitigate the issue of whether any discipline issued to stewards was lawful. The Board agreed with the ALJ that that imposition of more severe discipline on union stewards for participating with other employees in an unlawful walkout violated the Act. The lawfulness of the discipline issued to rank and file employees was not in dispute. The issue decided in *Miller Brewing* was whether additional discipline imposed because of the steward's union activity was unlawful. Here, unlike in *Miller Brewing*, Respondent seeks to relitigate the issue of the lawfulness of Sackin's discipline. Moreover Respondent's argument presumes that some lesser form of punishment issued to Sackin would have been lawful. Judge Kennedy rejected that contention when he found Respondent was motivated by anti union and anti protected concerted activity reasons .

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The issue of the lawfulness of Respondent's August 28, 2009 discipline of Sackin was fully litigated by the same parties before Judge Kennedy. Judge Kennedy found that Respondent's discipline of Sackin violated section 8(a)(1) and (3) of the Act.

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It is well established Board law that an administrative law judge may rely on the factual findings in a prior case under the doctrine of collateral estoppel. See *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1025 n.3 (1990); *Planned Building Services, Inc.*, 347 NLRB 670, 670 n.2 (2006); *Stark Electric, Inc.*, 347 NLRB 518, 518 n.1 (1999)

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Under the collateral estoppel doctrine, in the absence of newly-discovered and previously unavailable evidence, a party may not relitigate issues that were or could have been litigated in a prior proceeding. *Nursing Center at Vineland*, 318 NLRB 901, 903 (1995). These principles apply even where the prior case is still pending before the Board. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-95 (1998); *Detroit Newspaper Agency*, 326 NLRB 782 n.3 (1998), enf. denied, 216 F.3d 109 (D.C. Cir. 2000).

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Respondent's opportunity to convince a fact finder that it would have taken disciplinary action against Sackin absent his union or protected conduct has passed. The parties had an adequate opportunity to litigate that very issue.

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As I noted at the hearing in granting Counsel for the Acting General Counsel's Motion in Limine:

What counsel is asking me to do [here] is to assess a hypothetical situation that didn't exist -- that hasn't existed. The individual -- Mr. Sackin -- did not receive some lesser discipline. He was suspended for five days. That's what I'm dealt with, that's what Kennedy decided on. I'm basically going to find -- I'm going to take notice of Judge Kennedy's decision and I'm going to defer to it. I find that for me to parse out some hypothetical situation based on comparators, is creating something out of whole cloth. That's not what happened. Could it have happened? Well, maybe it could have, but it didn't. The man was suspended, he didn't receive a lesser discipline. And as such, I find I am bound by Kennedy's decision and I will grant General Counsel's Motion in Limine to preclude any further evidence on the issue of the discipline that Mr. Sackin received.

In the interests of advancing judicial efficiency and avoiding inconsistent results and delays attendant to the Board's review of Judge Kennedy's decision, I will rely on the prior conclusions Judge Kennedy reached regarding Respondent's August 28, 2009 discipline of Sackin.

Since Sackin was selected for layoff on June 15, 2010, solely because of his August 28, 2009 discipline found to be unlawfully discriminatory by Judge Kennedy, I conclude that Sackin's June 15, 2010 layoff likewise violated section 8(a)(1) and (3) of the Act as alleged.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist there from and to take certain affirmative action designed to effectuate the policies of the Act. As Respondent discriminatorily laid off Sackin, it must offer him reinstatement to his previous job, or if it is not available, to a substantially similar job, and make him whole for any loss of earnings and other benefits he may have suffered. Respondent shall take this action without prejudice to his seniority or any other rights or privileges he may have enjoyed. Back pay for Sackin, if any, shall be computed on a quarterly basis from the date of his layoff to the date Respondent makes a proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950). Back pay for Sackin shall be based on the length of his unlawful lay off. Daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (Oct. 22, 2010) shall be added to the net back pay amount. Furthermore, Respondent shall be required to expunge from its personnel files any reference to Sackin's illegal lay off. *Sterling Sugars*, 261 NLRB 472 (1982). The affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it will undertake. In addition to the physical posting of paper notices, the notices shall be distributed electronically, by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. See *J. Picini Flooring*, 356 NLRB No. 9, sl. op. at 3 (Oct. 22, 2010).

Based on the above findings of fact, I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Transportation Workers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On June 15, 2010, Respondent laid off its employee David Sackin because of his activities as a union steward on behalf of the Union and because he intended to give testimony on behalf of his fellow employees in a hearing before the State of Nevada Labor Commissioner; in doing so it violated Section 8(a)(3) and (1) of the Act.

Based on the above findings of fact and conclusions of law, I hereby issue the following recommended⁶

ORDER

Respondent, Wynn Las Vegas, LLC, Las Vegas, Nevada, its officers, agents, and representatives, shall

1. Cease and desist from:

a. Laying off employees because they are stewards for the Transportation Workers Union whose duties are to act for the mutual aid and protection of fellow employees, including serving as their representatives during misconduct investigations and assisting employees in legal proceedings aimed at improving working conditions.

b. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Within 14 days from the date of this Order, if not already done, offer David Sackin full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

b. Make David Sackin whole for any loss of earnings, plus interest compounded daily, and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of the decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoff of David Sackin, and within 3 days thereafter notify him in writing that this has been done and that the layoff will not be used against him in any way.

⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes

5 d. Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

10 e. Within 14 days after service by the Region, post at its casino in Las Vegas, Nevada, copies of the attached notice marked "Appendix." 26 Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since June 15, 2010.

25 f. Within 21 days after service by the Region, Respondent shall file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. July 26, 2011

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John J McCarrick
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT lay you off or otherwise discipline you because you are a steward for the **Transportation Workers Union** or because you engage in activity protected by law, including union activity or activities for the mutual aid and protection of your fellow employees

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed you by law.

WE WILL within 14 days from the date of the Board's order, if not already accomplished, offer David Sackin full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make **David Sackin** whole for any loss of earnings, plus interest compounded daily, and other benefits suffered as a result of the discrimination against him. **WE WILL** remove from our files any reference to the unlawful lay off of **David Sackin**, and thereafter notify him in writing that we have done so and that his lay off will not be used against him in any way.

WYNN LAS VEGAS, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

2600 North Central Avenue, Suite 1800

Phoenix, Arizona 85004-3099

Hours: 8:15 a.m. to 4:45 p.m.

602-640-2160.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 602-640-2146.